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Supreme Court, U.S.
FILED

No. (1) 07-365 JUL 16 2007

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In The

Supreme Court of the United States

EDWARD PLUMMER, JR.,

Petitioner,

v.

MIKE PEARLMAN; LARRY MALM; CALIFORNIA DEPARTMENT OF HEALTH SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil service employee who has been denied a post evidentiary hearing because of constructive retirement has been denied due process?

2. Whether the court was correct in basing its findings upon testimony of witnesses who lacked personal knowledge as to the subject matter to which they testified?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings below other than those identified in the caption of this petition.

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BRIEF FOR THE PETITIONER

Petitioner Edward Plummer, Jr., respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

It is the petitioners' understanding that the opinions of the United States Court of Appeals for the Ninth Circuit (No. 05-56578), and the Central District Court of California (D.C. No. CV-03-08734-GHK) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2007. The court of appeals affirmed the summary judgment previously rendered in the lower court. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1, in relevant part, of the Constitution of the United States provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this

> Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;. . . .
>
> The Fourteenth Amendment to the Constitution of the United States provides as follows:
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1367 provides, in relevant part, as follows:

> (a) Except as otherwise provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution . . .

STATEMENT

The court of appeals found that the petitioner, Edward Plummer, Jr., failed to present sufficient evidence to sustain his claims under 42 U.S.C.

§§ 1981 and 1983. The court relied on the testimony of the respondents in arguing that petitioner failed to shift the burden of proof back to the respondents. The court further relied on the testimony of respondent Malm regarding his belief that Plummer had been engaged in a sexual relationship. Finally, the court relied on testimony of respondent Pearlman that the conduct of Plummer was such that dismissal was within the departments' policy.

SUMMARY OF THE ARGUMENT

A determination as to whether administrative procedures are "constitutionally sufficient requires analysis of the governmental and private interest that are affected; *Arnett v. Kennedy, et al.*, 417 U.S. 977 (1974). The petitioner understands the need for the government to review and discipline its employees; especially those employed in a peace officer capacity. Petitioner further understands that the Court has, through the common law tradition, made it clear that there are procedural due processes that must be adhered to in order to ensure the protection of certain protected rights and interest. Failure to afford an employee a full post termination hearing and judicial review is inconsistent with the Courts' previous ruling; *Cleveland Board of Education v. Loudermill, et al.*, 470 U.S. 532 (1985). The continued deprivation of a full type evidentiary hearing is inconsistent with the United States Court of Appeals

for the Ninth Circuit ruling in *Oviatt v. Pearce*, 954 F.2d 1470 (199..

The testimony that the court relied on is based on information gathered by the respondents, for the respondents. The information and evidence presented in this matter has never been reviewed by an impartial evidentiary body; hence the petitioners' argument regarding credibility determination on the part of the district court. Furthermore, petitioner filed a motion to strike because they (respondents/defendants) made "wholesale references" to the appendix, and lacked personal knowledge of the true events, conduct, and motives at issue in this case; especially as they relate to Plummer; see petitioners' Motion to Strike in Case No. 05-56578. The failure of the court to recognize respondents obvious lack of knowledge and petitioners' Motion to Strike their arguments has resulted in an error that has adversely affected the substantial rights of the petitioner in this matter; Federal Rules of Evidence §§ 103.8, 602 et seq.

The court relied heavily on the testimony of Malm and his belief. Malms' beliefs in the absence of requirements outlined in section(s) 104(b) and 702.2 of the Federal Rules of Evidence are mere speculations and conjectures. No witness is permitted to guess or render an opinion based on mere conjecture; see Federal Rules of Evidence § 602.

The respondents as well as the petitioner must only present evidence which is consistent with the

Federal Rules of Evidence. Additionally, the enforcement of laws and regulations must be consistent with the laws embodied in the United States Constitution. The Due Process Clause of the United States Constitution contains a substantive component that bars arbitrary wrongful government actions regardless of the rationale; *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *United States v. Salerno*, 481 U.S. 739 (1987). The petitioner must be afforded due process and equal protection of the law.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD PLUMMER, JR., Plaintiff-Appellant, v. MIKE PEARLMAN; LARRY A. MALM; CALIFORNIA STATE DEPARTMENT OF HEALTH SERVICES, Defendants-Appellees.	No. 05-56578 D.C. No. CV-03-08734-GHK MEMORANDUM* (Filed Apr. 19. 2007)

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Submitted December 11, 2006**

Before: FARRIS, BOOCHEVER, and LEAVY, Circuit Judges.

Edward Plummer, Jr. appeals pro se the district court's grant of summary judgment in favor of Mike Pearlman and Larry Malm, Plummer's supervisors at the California Department of Health Services (DHS),

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in Plummer's 42 U.S.C. §§ 1981 & 1983 action alleging claims for retaliation, racial discrimination, and a hostile work environment. Plummer also appeals the district court's award of costs to Pearlman and Malm of $1,800.60. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004), and we affirm.

Plummer presented insufficient evidence to raise a triable issue of fact whether the reasons given in the Notice of Dismissal were pretextual. While Malm did not believe that Plummer had assaulted Chen and thought dating Chen might be permissible, he did believe that Plummer had had a sexual relationship with Chen and promised her employment. Therefore, Plummer did not produce evidence showing that the reasons given in the Notice of Dismissal were not credible. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996). Moreover, Pearlman's declaration states that dismissal in the first instance in the case of serious misconduct does not violate DHS policy.

The district court did not make credibility determinations when granting defendants' motion for summary judgment. Instead, the district court examined the evidence supporting each allegation in the light most favorable to Plummer.

Plummer's assertion that the district court only considered "separately each alleged discrimination or retaliation, rather than considering the totality of the

circumstances" is meritless. The district court specifically considered Plummer's complaints in the aggregate and concluded that they did not establish that Plummer was subject to an adverse employment action.

The district court did not err in holding that DHS's four-day advance notice to Plummer of an investigatory interview was not an adverse employment action. Plummer was provided with notice of the investigative interview. Even if four days is short notice, it is not reasonably likely the complained-of delay in notification would deter an employee from engaging in protected activity. *See Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000).

Plummer failed to present sufficient evidence that he was subjected to: 1) any adverse employment action other than the Notice of Dismissal; and 2) a severe or pervasively hostile work environment. Thus, the district court properly entered summary judgment against his claims for retaliation, racial discrimination and a hostile work environment. *See Brooks v. City of San Mateo,* 229 F.3d 917, 928-29 (9th Cir. 2000); *Manatt v. Bank of America,* 339 F.3d 792, 798 (9th Cir. 2003).

The district court's judgment and award of costs is AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 03-8734-GHK (PLAX) Date: September 13, 2005

Title: Plummer v. Pearlman, et al.

DOCKET ENTRY

PRESENT: Hon. *George H. King*, United States District Judge

Beatrice Herrera	None
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment

This matter is before the Court on the above entitled motion. This motion is appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15 (formerly Local Rule 7.11). After considering all the papers filed, we rule as follows:

I. Background

The parties are familiar with the facts in the current action. Consequently, we will not repeat any facts except as necessary.

II. Discussion

A. Legal Standard

Defendants, as the parties moving for summary judgment, must demonstrate that no genuine issue of material fact exists, and that they are entitled to judgment as a matter of law. *Porter v. Cal. Dept. of Corr.*, 383 F.3d 1018, 1024 (9th Cir. 2004). Once Defendants meet their initial burden, Plaintiff, who has the burden at trial, "must set forth specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks omitted). We must examine the evidence in the light most favorable to Plaintiff and may not evaluate credibility or weigh conflicting evidence. *Id.* Nevertheless, Plaintiff must, either by affidavits or as otherwise provided by Fed. R. Civ. P. 56, set forth specific facts showing that there is a genuine issue of material fact. Fed. R. Civ. P. 56(e). A mere "scintilla" of evidence supporting Plaintiff's position will not suffice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). There must be enough evidence for a jury to reasonably find for Plaintiff. *Id.*

B. Retaliation

To establish a prima facie case for retaliation, Plaintiff must demonstrate that (1) He engaged in a protected activity; (2) His employer thereafter subjected him to an adverse employment action; and (3) A causal link existed between the protected activity and the adverse employment action. *See Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). If Plaintiff provides sufficient evidence to make a prima facie showing of retaliation, "the burden shifts to [Defendants] to articulate a legitimate, non-retaliatory reason for [their] actions." *Porter*, 383 F.3d at 1029. If Defendants succeed in doing so, Plaintiff "bears the ultimate burden of submitting evidence indicating that [Defendants'] proffered reason is merely a pretext for a retaliatory motive." *Id.*

Plaintiff argues that Defendants subjected him to adverse employment actions, which consisted of (1) Delayed notice of investigative interview; (2) Unwarranted counseling sessions; (3) Unwarranted audits of Plaintiff's office; (4) Specious grievances against Plaintiff filed by subordinates; (5) Denial of opportunities to participate as a Rangemaster in firearm qualifications; (6) Transfer and hiring practices that undermined Plaintiff's authority; (7) Failure to investigate complaints raised by Plaintiff; (8) Unwarranted changes to Plaintiff's clerical staff without his involvement; (10) Denial of the opportunity to act as a temporary region supervisor; (11) Receipt of an article entitled "Understanding the Generation X Officer"; (12) Refusal to hold supervisor meetings at Plaintiff's

office; (13) Failure to provide Plaintiff's staff with ammunition; and (14) Receipt of a notice of termination (the "Notice").

1. Complaints Do Not Amount to Adverse Employment Actions

An action is an adverse employment action if it is reasonably likely to deter an employee from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). "Among those employment decisions that can constitute an adverse employment action are termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion." *Brooks*, 229 F.3d at 928.

Even assuming that Plaintiff engaged in protected activities, nothing in the record establishes that Plaintiffs' complaints, with the exception of the Notice, discussed below, were adverse employment actions.

a. Delayed Notice of Investigative Interview

Plaintiff does not complain that his interview regarding Chen was an adverse employment action; rather, he claims that he was given untimely notice of the time and date of his interview. Cal. Govt. Code § 3305, however, does not impose a timing requirement. As such, a purported delay in notification, as a matter of law, is not an adverse employment action

since it is not reasonably likely that it would deter an employee from engaging in protected activity. *See Ray*, 217 F.3d at 1242-43.

b. Unwarranted Counseling Sessions

None of the counseling sessions between Defendants and Plaintiff amounted to an adverse employment action. Nothing in the record suggests that Pearlman encouraged Plaintiff's subordinates to file specious grievances against Plaintiff that triggered any counseling sessions. At most, Plaintiff's evidence suggests only that the subordinates may have encouraged each other to file grievances, but not that Defendants directed them to file specious grievances. *See* Ezoe Decl. ¶ 7; Mendes Decl. ¶¶ 5-7.

Moreover, even assuming that the grievances were unwarranted, Plaintiff was not sleeping at work, and that it was not inappropriate to refer to his office as the "Rock," none of the issues raised in any of the counseling sessions were reasons for the Notice. *See* Defs. Ex. 88.

In addition, none of the counseling sessions gave rise to any documentation that was placed in Plaintiff's personnel file. Pearlman Decl. ¶ 32; Malm Decl. ¶ 16. Also, Plaintiff does not submit any evidence to the contrary.

Consequently, nothing in the record shows that the counseling sessions had any impact on Plaintiff's career or negative effect that would reasonably deter

an employee from engaging in protected activity. *See Ray*, 217 F.3d at 1242-43; *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir. 2000) (recognizing that employee evaluation that did not result in demotion, termination, or suspension, decrease in responsibilities, denial of raises, or reduction in salary or other benefits did not amount to an adverse employment action in the retaliation context); *Medina v. Income Support Div., State of New Mexico*, 413 F.3d 1131, 1137 (10th Cir. 2005) (holding that reprimand letter that was not placed in employee's personnel file was not an adverse employment action in the retaliation context).

c. Unwarranted Audits of Plaintiff's Office

Despite Plaintiff's contention, nothing in the record shows that plaintiff was the only supervisor who was audited. Indeed, Plaintiff's reference to Pearlman's declaration reveals not that the audit of Plaintiff's office was a unique event, but that Pearlman had audited another supervisor in the past and two other offices after he audited Plaintiff's office. Pearlman Decl. ¶¶ 22, 35. Moreover, as with the counseling sessions, nothing in the record suggests that the audit had any effect on Plaintiff that would be reasonably likely to deter an employee from engaging in protected activity.

d. Specious Grievances Against Plaintiff Filed by Subordinates

Plaintiff complains that grievances filed by three subordinates amounted to adverse employment actions. However, the grievances were filed by subordinates, not by Plaintiff's supervisors. Also, nothing in the record shows that Defendants directed the subordinates to file unwarranted grievances. Plaintiff declares that "Pearlman allowed and encouraged [the subordinates] to bypass [Plaintiff] and secretly complain about [him] and criticize [his] supervision." Plummer Decl. ¶ 4. However, Plaintiff's declaration is not admissible as it is speculative, made without personal knowledge, and conclusory. Moreover, even assuming that Pearlman allowed the subordinates to complain directly to him, Plaintiff's declaration does not suggest that Pearlman told him to file unwarranted grievances. *See id.* As such, grievances filed by an employee's subordinates that were not fabricated at the direction of the employer would not reasonably deter an employee from engaging in protected activity.

e. Denial of Opportunities to Participate as a Rangemaster in Firearm Qualifications

The fact that Plaintiff did not participate as a Rangemaster in firearm qualifications was not an adverse employment action. Plaintiff admits that participation does not give rise to additional compensation, or direct benefits. Plummer Depo. at 31:5-8.

Malm and Pearlman also declare that participation has no impact on career advancement, salary or benefits, and no documentation of employee participation is placed in the employee's personnel file. Malm Decl. ¶ 21; Pearlman Decl. ¶ 73. Moreover, Plaintiff submits no admissible evidence to dispute such statements. As such, the denial of opportunities to participate as a Rangemaster is a trivial complaint that, as a matter of law, does not amount to an adverse employment action. *See Brooks*, 229 F.3d at 928 ("only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation").

f. Transfer and Hiring Practices that Undermined Plaintiff's Authority

Regardless of whether subordinates were transferred and applicants hired or not hired without Plaintiff's consultation, Defendants' transfer and hiring activities did not amount to adverse employment actions. Plaintiff makes no allegation that the hiring and transfer practices made it more difficult for him to perform his duties. Moreover, it is undisputed that, as Plaintiff's supervisors. Defendants had the authority to make such decisions without Plaintiff's prior consultation. *See* Pearlman Decl. ¶¶ 39-40; Malm Decl. ¶ 30.

g. Failure to Investigate Complaints Raised by Plaintiff

Plaintiff complains that Defendants inadequately investigated conduct by Merchant and the initial lack of business cards for Ezoe. These issues, however, are not adverse employment actions. Rather than ignore Plaintiff's discipline of Merchant, the record indicates, and Plaintiff does not submit any evidence to the contrary, that both Pearlman and the Office of Civil Rights ("OCR") reviewed the incident and in fact upheld Plaintiff's handling of the incident. Pearlman Decl. ¶ 91; Victor Decl. ¶¶ 2-6. As to the business cards, it is unlikely that an employee would be deterred from engaging in protected activity merely because a subordinate did not timely receive her business cards. These are trivial matters that do not, as a matter of law, amount to adverse employment actions. *See Brooks*, 229 F.3d at 928 ("only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation").

h. Unwarranted Changes to Plaintiff's Procedures for Welfare Office Referrals

Nothing in the record suggests that Defendants' changes to Plaintiff's procedures for welfare office referrals was unwarranted. Ezoe's and Mendes' declarations lack an adequate foundation for admissibility as there is no showing that they are in positions to determine what procedures are efficient, appropriate, and in compliance

with the Department of Health Services' ("DHS") policies, *See* Ezoe Decl. ¶ 8; Mendes ¶ 9. Moreover, Plaintiff was given 45 days to implement the changes. Pearlman Decl. ¶ 97. As such, nothing suggests that the change in procedures would deter an employee from engaging in protected activity. *See Ray*, 217 F.3d at 1242-43.

i. Advice to Plaintiff's Clerical Staff Without His Involvement

Pearlman's advice to one of Plaintiff's clerical staff on how to get an "in-house" promotion was not an adverse employment action. Even characterizing the advice as a trivial employment action is a stretch. As "only non-trivial employment action that would deter reasonable employees from" engaging in protected activities are actionable, Pearlman's advice was not an adverse employment action. *See Brooks*, 229 F.3d at 928.

j. Denial of the Opportunity to Act as a Temporary Region Supervisor

Plaintiff's complaint that he was not left in charge of the region when Pearlman was unavailable raises a trivial employment action, if anything. *See id.* Temporarily supervising the region does not result in extra pay, benefit or recognition, and no documentation of such activity is placed in the participant's personnel file. Pearlman Decl. ¶ 86. Moreover, Plaintiff has submitted no evidence to the contrary. As such, nothing in the record establishes that the denial

of an opportunity to be in charge would deter an employee from engaging in protected activity.

k. Receipt of Article Entitled "Understanding the Generation X Officer"

Plaintiff's receipt of the article was a trivial employment action, if anything. Moreover, the record indicates that Plaintiff was not singled out, and that the article was disseminated to all supervisors. *See* Pearlman Decl. ¶¶ 87-88. Also, Plaintiff submits no admissible evidence in dispute. *See* Plummer Depo. 264:10-265:18 (stating only that he received the article). Thus, Plaintiff's receipt of the article was not an adverse employment action.

l. Refusal to Hold Supervisor Meetings at Plaintiff's Office

That no supervisor meetings were held at Plaintiff's West Covina office is, at best, a trivial employment action. Nothing in the record suggests that hosting such meetings advances one's career or confers any other benefit. Moreover, the record indicates, and Plaintiff submits no evidence in dispute, that meetings were in fact held at Plaintiff's office, albeit his former City of Industry office. *See* Pearlman Decl. ¶ 76. As such, the lack of supervisor meetings at Plaintiff's office was not an adverse employment action.

m. Failure to Provide Plaintiff's Staff with Ammunition

Nothing in the record shows that Plaintiff's staff was not provided ammunition when required. Moreover, Plaintiff admits that his subordinates did receive ammunition to perform their duties and qualifications. Plummer Depo. 54:23-55:14. Consequently, not only does Plaintiff's complaint not raise an adverse employment action, but it does not even amount to any action by Defendants.

n. Complaints in the Aggregate

We conclude that Plaintiff's complaints, even when considered in the aggregate, do not establish that Plaintiff was subjected to an adverse employment action. Plaintiff's complaints are largely trivial and would not reasonably deter an employee from engaging in protected activity. Indeed, some of Plaintiff's complaints do not even involve him or action by Defendants. Further, none of the complaints were relied upon for purposes of the Notice. Additionally, nothing in the record suggests that any of Plaintiff's complaints involved actions that would confer any benefits, or, on the other hand, result in any record that would negatively impact his career. As such, even when considered in the aggregate, the record does not establish, with the exception of the Notice, discussed below, that Plaintiff was subjected to an adverse employment action.

2. Receipt of the Notice[1]

Assuming that Plaintiff engaged in protected activities, Plaintiff's receipt of the Notice is not actionable since Plaintiff has not established a sufficient causal link between his alleged protected activity and the Notice. Plaintiff's internal complaint to Pearlman was submitted on October 7, 2002. His first and second EEOC claims were filed on January 18, 2003, and March 31, 2003. And his tort claim with DHS was filed on March 18, 2003. The Notice, however, was issued on May 2, 2004. The approximate thirteen to nineteen month difference, therefore, is not sufficiently proximate in time to establish a causal connection. *See, e.g., Vasquez v. County of Los Angeles,* 349 F.3d 634, 646 (9th Cir. 2003) (finding no causal connection between protected activity and adverse employment action thirteen months later); *Manatt v. Bank of Am., NA*, 339 F. 3d 792,802 (9th Cir. 2003) (finding that employee failed to establish causal link, as required for § 1981 retaliation claims, between publication of her discrimination complaint and alleged adverse decisions, approximately nine months later); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (finding no causal

[1] Since Plaintiff voluntarily retired from his position at DHS, Plaintiff's claim, if any, perhaps should have been couched as one for constructive discharge. Nevertheless, for purposes of this motion and viewing the record most favorably for Plaintiff, we will assume for present purposes that the Notice was itself the adverse employment action, even in the absence of the showing otherwise required for a constructive discharge claim.

link where termination occurred nearly a year and a half after complaint).

Additionally, even if Plaintiff had established a causal link, Defendant shave provided legitimate non-retaliatory reasons for the Notice, which Plaintiff has failed to demonstrate are pretextual. The Notice specifically provided that Plaintiff engaged in unprofessional conduct with Chen that warranted dismissal. Ex. 88 at AGO-0922. The OCR findings, upon which the Notice was based, determined that Plaintiff had an intimate relationship with Chen, and applicant for employment with the DHS, wrote Chen a note promising her employment, and violated DHS policy by contacting Chen during the investigation. Ex. 53 at AGO-0501-03.

Plaintiff, however, fails to demonstrate that the basis for the Notice was pretextual. Plaintiff asserts that Malm and the OCR investigators did not believe Chen, Malm stated that dating Chen would not be a violation of DHS policy, Malm failed to institute a lesser form of discipline prior to recommending Plaintiff's termination, Plaintiff was not informed that the investigation was ongoing when he contacted Chen in September, he only wrote the note to calm Chen down, and Pearlman knew of Chen before the notice. Even viewing the facts favorably for Plaintiff, however, Plaintiff's arguments are insufficient and do not demonstrate a genuine issue of material fact as to whether the proffered reasons are pretextual.

Plaintiff does not dispute that he had a relationship with Chen, that he wrote the note, and that he contacted Chen in September. Pl.'s Depo. at 212:1-224:8. As such, the fact that the OCR investigators and Malm doubted Chen's credibility is insufficient to show pretext as Plaintiff has admitted to the issues that formed the bases for the Notice. Moreover, Plaintiff mischaracterizes the conclusions of Malm and the OCR investigators. Nothing in the record establishes that Malm did not believe the entirety of Chen's allegation. Rather, Malm's deposition demonstrates only that he did not believe her allegations of sexual assault. Malm Depo. at 49:24-50:15. Similarly, although the OCR investigators doubted Chen's credibility, they nevertheless concluded that "all events would lead a reasonable person to believe that there was a consensual and ongoing relationship" between Chen and Plaintiff. Defs. Ex. 53 at 10.

Moreover, the record does not show that Malm told Plaintiff that "it would not be a violation [DHS'] policy for Plummer to date Chen." Opp'n at 9:10-12. Plaintiff's declaration that "Malm [told him before September 2003 that [he] had done nothing wrong" says nothing about DHS' policies. Regardless, even assuming that, as of September 2003, Malm was of the opinion that dating Chen was not improper, the OCR investigation underlying the Notice did not conclude until October 8, 2003, that Plaintiff's interactions with Chen violated DHS' policies. *See* Defs. Ex. 53 at 12.

Additionally, that Plaintiff was not subjected to a lesser form of discipline prior to termination does not suggest pretext, DHS' discipline guide establishes that dismissal is warranted without prior adverse action for serious infractions. Pl.'s Ex. A.

Similarly, Plaintiff's allegation that he was not informed that the investigation was ongoing does not establish a genuine issue of material fact as to whether the Notice was based upon retaliatory motives. Plaintiff has not presented any evidence, let alone specific and substantial evidence, that Defendants told him that the investigation had concluded or that it was permissible for Plaintiff to communicate with Chen. *See* Plummer Decl. ¶ 13 (stating only that Malm told him not to have any contact with Chen in September 2003).

Also, regardless of Plaintiff's motive for writing the note, he admits that he wrote at least that portion of the note that states that he "will issue employment letter. . . ." Plummer Depo. at 234:19-237:20; Defs. Ex. 77.

Lastly, whether or not Pearlman knew of Chen before the Notice is irrelevant. Pearlman was not interviewed as a witness in the OCR investigation and nothing in the record suggests that he was otherwise relied upon by the OCR investigators to reach their conclusion that Plaintiff violated DHS' policies. *See* Defs. Ex. 53 at 8-9.

Thus, not only has Plaintiff failed to establish a causal link between the Notice and his alleged protected activity, but he has also failed to raise a triable

issue as to whether Defendants' legitimate non-retaliatory reasons for the Notice are pretextual.

3. Conclusion Regarding Retaliation

In light of the foregoing, we **GRANT** summary judgment against Plaintiff's claim for retaliation. Defendants have presented legitimate non-retaliatory reasons for the Notice, and Plaintiff has failed to submit either direct or indirect evidence to raise a triable issue as to whether such reasons are pretextual. Moreover, none of the Plaintiff's other complaints, standing alone or in the aggregate, amounts to an adverse employment action.

C. Discrimination

To establish a prima facie case of discrimination, Plaintiff must demonstrate that: (1) He belongs to a protected class; (2) He was qualified for his position; (3) he was subjected to an adverse employment action; and (4) Individuals outside of his protected class were treated more favorably. *See Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658, 660 (9th Cir. 2002).

In light of the discussion regarding retaliation, Plaintiff's claim for discrimination also fails. An action is an adverse employment action in the retaliation context if it is reasonably likely to deter an employee from engaging in protected activity. *Ray*, 217 F.3d at 1242-43. In the discrimination context, on

the other hand, an action is an adverse employment action if it materially affects the terms, conditions, or privileges of employment. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1126 (9th Cir. 2000). Since Plaintiff's complaints, with the exception of the Notice, would not reasonably deter an employee from engaging in protected activity, we also conclude that they did not materially affect the terms, conditions, or privileges or employment. Moreover, nothing in the record suggests otherwise.

In addition, Defendants have shown legitimate non-discriminatory reasons for the Notice, and Plaintiff has failed to raise a triable issue as to whether such reasons are merely pretext for racial discrimination. None of the reasons for the Notice suggests any discriminatory intent. *See* Defs.' Ex. 53. Moreover, as discussed above, Plaintiff's assertions regarding pretext are either irrelevant or unsupported by competent evidence. As such, Plaintiff has failed to raise a genuine issue of material fact as to whether the proffered reasons are pretextual. *See Blue v. Widnall*, 162 F.3d 541, 547 (9th Cir. 1998) (finding summary judgment appropriate where plaintiff failed to present evidence that defendant's proffered explanation was pretextual so that a rational trier of fact could find discriminatory intent).

Thus, we **GRANT** summary judgment against Plaintiff's claim for discrimination.

D. Hostile Work Environment

To establish a prima facie case of hostile work environment, Plaintiff must demonstrate that: (1) He was subjected to verbal or physical conduct of a racial nature; (2) Such conduct was unwelcome; (3) Such conduct was sufficiently severe or pervasive to alter the condition of his employment and create an abusive work environment; (4) He perceived the working environment to be abusive or hostile; and (5) A reasonable man in his circumstances would consider the working environment to be abusive or hostile. *See Puller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

To be sufficiently severe, pervasive, and abusive, a court should consider: (1) The frequency of the discriminatory conduct; (2) The severity of the conduct; (3) Whether the conduct is physically threatening or merely offensive; and (4) Whether the conduct reasonably interferes with the employee's performance. *See Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998).

Plaintiff's hostile work environment claim is insufficient. As discussed above, Plaintiff's complaints in isolation or in the aggregate were largely trivial, and had no effect on Plaintiff's career. *See Porter*, 383 F.3d at 1027 (recognizing that the crucial inquiry is whether the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment). Consequently, there is no basis for inferring

that any alleged conduct by Defendants was so severe or pervasive as "to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive. . . ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Thus, even viewing all of the evidence in the light most favorable to Plaintiff, we conclude that Plaintiff's complaints do not identify incidents that are sufficiently severe or pervasive. Accordingly, we **GRANT** Defendants' motion for summary adjudication as to this claim.

III. Disposition

I light of the foregoing, Defendants' motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Initials of Deputy Clerk /s/ Beatrice Herrera

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Edward Plummer, Jr., Plaintiff, vs. Mike Pearlman, Larry A. Malm, and Does 1 through 10, Inclusive, Defendants.	No. CV 03-8734-GHK(**PLAx**) **JUDGMENT** **THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).** (Filed Sep. 13, 2005)

Pursuant to our September 13, 2005, order granting summary judgment in favor of defendants. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that this action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: September 13, 2005

/s/ George H. King
GEORGE H. KING
United States District Judge

EDWARD PLUMMER, JR.

1658 Club Drive
Pomona, California 91768
Tel. (909) 623-3756
Plaintiff-Appellant, *pro se*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PLUMMER, JR., Plaintiff-Appellant **v.** **MIKE PEARLMAN, LARRY A. MALM, and JOHN DOES 1-10, inclusive,** Defendants-Respondents	Case No.: **05-56578** **MOTION TO STRIKE DEFENDANTS' BRIEF WITH DECLARATION OF PLAINTIFF-APPELLANT EDWARD PLUMMER, JR., IN SUPPORT**

TO THE HONORABLE JUDGES OF THE NINTH CIRCUIT COURT OF APPEALS AND TO ALL PARTIES TO THE WITHIN ACTION:

Plaintiff-Appellant Edward Plummer, Jr., hereby moves the Ninth Circuit Court of Appeals to strike the defendants' brief. Plaintiff will rely upon the accompanying Declaration of Edward Plummer, Jr., in support of this motion.

Respectfully Submitted,

/s/ Edward Plummer, Jr.
Edward Plummer, Jr.
Plaintiff-Appellant, *pro se*

EDWARD PLUMMER, JR.
1658 Club Drive
Pomona, California 91768
Tel. (909) 623-3756
Plaintiff-Appellant, *pro se*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PLUMMER, JR.,	Case No.: **05-56578**
Plaintiff-Appellant **v.** **MIKE PEARLMAN, LARRY A. MALM, and JOHN DOES 1-10, inclusive,** Defendants-Respondents	**DECLARATION OF PLAINTIFF-APPELLANT EDWARD PLUMMER, JR., IN SUPPORT OF HIS MOTION TO STRIKE DEFENDANTS' BRIEF,**

EDWARD PLUMMER, JR., of full age and sound mind, duly sworn according to the law, deposes and says:

1. This is an appeal of a summary judgment granted to the defendants. Plaintiff's claims are brought under, *inter alia*, Title VII. Plaintiff is an African-American who claims, *inter alia*, that he was terminated in relation for filling an EEOC Complaint against his Caucasian supervisors.

2. Defendants were required to set forth in their response brief their "legitimate, non-discriminatory" reasons for plaintiff's termination. They did not do so. This is all that their brief said on the issue: "As

argued below, Defendants' supporting declarations provided the district court with thorough and meticulous evidence demonstrating their legitimate motives." *See* Defendants' Brief at Pg. 17.

3. Instead of referring the court to the portions of the record supporting their argument, defendants have wholesale referred the court to an appendix that is about 10 volumes.

4. Plaintiff asks that this part of defendants' brief be stricken from the record for foregoing reason.

Respectfully Submitted,

/s/ Edward Plummer, Jr.
Edward Plummer, Jr.
Plaintiff-Appellant, *pro se*

Dated: May 25, 2006